

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*
State Engineer

Plaintiff,

vs.

ROMAN ARAGON, *et al.*,

Defendants.

6:69-cv-07941-BB

RIO CHAMA STREAM SYSTEM

Section 4, Rio El Rito

JOINT MOTION FOR SUPPLEMENTAL ORDER
ON IRRIGATION WATER REQUIREMENTS
IN SECTION 4 OF THE RIO CHAMA STREAM SYSTEM

COMES NOW the Plaintiff State of New Mexico, *ex rel.* State Engineer (“State”), and the El Rito Ditch Association, by and through their undersigned counsel, and jointly request the Court to enter a Supplemental Order on irrigation water requirements in Section 4 of the Rio Chama Stream System (“El Rito”). The Order should supplement the Partial Final Decree entered on June 25, 1973, and amend the Agreement on Water Rights and Consent Judgment for the El Rito Ditch Association, and all individual subfile orders entered in the El Rito Section to date, with respect to the determination of irrigation water requirements in the El Rito Section. In addition, the current bylaws of the El Rito Ditch Association should be attached as an Appendix to the Supplemental Order, and a copy of the Supplemental Order and Appendix should be mailed to all defendants in the El Rito Section. In support of this motion the State and the El Rito Ditch Association state the following.

1. On June 25, 1973, the Court entered a Partial Final Decree in the El Rito Section of the Rio Chama Stream System (hereinafter “1973 PFD”). The 1973 PFD approved and confirmed all

orders entered in the individual and community ditch association subfiles of the El Rito Section, as against the State of New Mexico, and *inter se* between and among any and all defendants diverting water within the El Rito Section. *See Partial Final Decree Rio El Rito Stream System* entered June 25, 1973 (Doc. No. 2394). Individual subfile orders in the El Rito Section, and the Consent Judgment entered with respect to the El Rito Ditch Association, established a farm delivery requirement (FDR) of 2.8 acre-feet per acre per annum delivered at the farm headgate. *See Agreement on Water Rights and Consent Judgment* entered May 30, 1973 (Doc. No. 2373); *see also Final Status Report by State Engineer* filed July 19, 1973 (Doc. No. 2400). Individual subfile orders and the 1973 PFD did not make a determination of consumptive irrigation requirements (CIR) or project diversion requirements (PDR), or include information on acequia customs with respect to the allocation and distribution of water.¹

2. Under the terms of the 1973 PFD, this Court retains jurisdiction of this cause until further order for the purpose of enforcing the provisions of that decree, and entering such supplementary orders as may be necessary for the enforcement, modification and correction of the decree and the orders heretofore entered. *See Partial Final Decree Rio El Rito Stream System* entered June 25, 1973, p.3, ¶ 7; *see also Order on Procedures for Correcting and Amending Subfile Orders* filed February 23, 1995 (Doc. No. 4000).²

¹ As used herein and in the documents cited in connection with these proceedings, the terms “project diversion requirement” and “project delivery requirement” are equivalent. The first term is probably more technically correct. *See New Mexico State Engineer Office Technical Report 47*, Brian C. Wilson, P.E., July 1992, p. 70 (Glossary: “Project diversion requirement or off-farm diversion requirement (PDR)”).

² Approximately 100 of the 353 irrigation rights in the El Rito Section are currently tagged as problem subfiles. *See Data Management Report on Errors and Omissions and Proposed (continued...)*

3. In 1996, the State of New Mexico, the El Rito Ditch Association and various Acequia Associations in the Ojo Caliente Section (Section 2) filed motions to correct or modify the determination of irrigation water requirements in the El Rito and Ojo Caliente Sections of the Rio Chama Stream System. *See New Mexico's Motion to Correct Irrigation Water Requirements* filed October 29, 1996 (Doc. No. 5525); *Ojo Caliente Acequias' and El Rito Ditch Association's Motion to Modify Previously Adjudicated Irrigation Water Requirements* filed October 15, 1996 (Doc. No. 5511). Eventually, the State, the El Rito Ditch Association, and the Acequia Associations in the Ojo Caliente Section, reached a settlement agreement and stipulated to CIR (Consumptive Irrigation Requirement) and FDR values in those sections and to other matters related to the diversion and distribution of water. *See Stipulation and Settlement Agreement* filed August 13, 1997 (Doc. No. 5677); *Stipulation and Settlement Agreement* filed September 17, 1998 (Doc. No. 5824); *Appendix to Docket Nos. 5677 and 5824 Stipulation and Settlement Agreement Between the State of New Mexico and the El Rito Ditch Association and La Asociación de las Acequias del Rio Vallecitos, Tusas y Ojo Caliente* filed December 22, 1998 (Doc. No. 5837); (collectively “1998 Settlement Agreement”).

4. The 1998 Settlement Agreement between the State and El Rito Ditch Association, and between the State and Acequia Associations in Section 2, was approved and adopted by this Court by Order entered January 7, 1999 (“January 7, 1999 Order”). *See Order Granting Joint Motion for Adoption of Stipulation and Settlement Agreement* entered January 7, 1999 (Doc. No. 5838); *see also Order Granting Joint Motion for Adoption of Appendix to Stipulation and Settlement Agreement*

²(...continued)

Schedule for their Investigation and Resolution filed September 22, 1994 (Doc. No. 3518).

entered January 7, 1999 (Doc. No. 5839).³

5. Under the terms of the January 7, 1999 Order adopting the stipulation and settlement agreement between the State and the El Rito Ditch Association, the 1998 Settlement Agreement is “binding on the State of New Mexico, all community and private ditches and all individual water rights claimants in the El Rito and Ojo Caliente Sections of the Rio Chama adjudication.” January 7, 1999 Order, ¶ 5. In the El Rito Section, the 1998 Settlement Agreement provides for a CIR of 1.68 acre-feet per acre per annum and a FDR of 3.73 acre-feet per acre per annum for surface water irrigation use. *Stipulation and Settlement Agreement* filed August 13, 1997, ¶¶ 3 & 4. In order to clarify the record and the effect of the January 7, 1999 Order, all individual subfile orders entered to date in the El Rito Section and the 1973 Agreement on Water Rights and Consent Judgment with respect to the El Rito Ditch Association should be amended to include the irrigation water requirements described in the 1998 Settlement Agreement. There are approximately 403 individual subfiles associated with 14 community ditches in the El Rito Section, and approximately 34 individual subfiles associated with 19 private ditches in this same section. *See Final Status Report by State Engineer* filed July 19, 1973, pp. 20-1. In order to clarify the record, the individual subfile orders described above should be expressly revised and amended.⁴

³ Although the proceedings and eventual settlement agreement involved both the El Rito and Ojo Caliente Sections (Sections 4 and 2 of the Rio Chama Stream System), at this time the State requests a Supplemental Order that addresses the irrigation water requirements in El Rito Section only. There is no Partial Final Decree in the Ojo Caliente Section, and the State believes that further orders concerning the determination of irrigation water requirements in the Ojo Caliente Section should be handled separately.

⁴ In finding that the 1998 Settlement Agreement is binding on private ditches and individual water rights claimants in the Rio Rito and Ojo Caliente Sections, the Court made the following findings: notice of the proceedings to re-determine irrigation water requirements in the El (continued...)

6. In addition to the redetermination of the irrigation water requirements described in paragraph 5 above, the 1998 Settlement Agreement included other matters related to the diversion and distribution of water by acequias and ditches in the El Rito and Ojo Caliente Sections. Specifically, the parties stipulated that PDR (“project delivery requirement, calculated by dividing the FDR by the off-farm conveyance efficiency”) “shall not be used as the measure of the right of an acequia to divert water from a stream in the Ojo Caliente and El Rito Sections.” *Stipulation and Settlement Agreement* filed September 17, 1998, ¶ 5. Further, the parties stipulated that “to the extent that local or community customs have been incorporated into the bylaws of a community ditch and have for their object the economical use of water and are not detrimental to the public welfare, such rules shall govern the distribution of water from such ditches to the persons entitled to water therefrom.” *Id.* Further, the parties stipulated that “written agreements between ditches dividing the waters of a common source shall govern the distribution of water between those ditches so long as the agreement remains in effect.” *Id.* In order to clarify the record and the effect of the January 7, 1999 Order, the Agreement on Water Rights and Consent Judgment with respect to the El Rito Ditch Association entered on May 30, 1973 should be amended to include the stipulations described above with respect to the diversion and distribution of water by acequias and ditches in the El Rito Section.

7. Following the approval and adoption of the 1998 Settlement Agreement, the members of the El Rito Ditch Association adopted bylaws that incorporate a longstanding local or community

⁴(...continued)

Rito and Ojo Caliente Sections was served on all individual water rights claimants in those sections; there were no responses to the Joint Motion for Adoption and Entry of Stipulation and Settlement Agreement between the State and the Acequia Associations in Sections 2 and 4, and; the Special Master held a hearing for the purpose of receiving any objections to the adoption of the Settlement Agreement and no objections were made. *Order Granting Joint Motion for Adoption of Stipulation and Settlement Agreement* filed January 7, 1999, §§ 1-4.

custom for the distribution of water to members of the association on the basis of time (“tiempos”). See Exhibit A attached hereto (El Rito Ditch Association Bylaws dated and adopted January 15, 2007). Pursuant to the *Stipulation and Settlement Agreement* filed September 17, 1998, ¶ 5, these rules govern the distribution of water by the Association to its members. In order to provide notice of these rules to water rights owners and purchasers of property in the El Rito Section, the Supplemental Order proposed above should direct that a copy of the current bylaws of the El Rito Ditch Association be attached as an Appendix to the Supplemental Order, and the Supplemental Order and Appendix should be mailed to all defendants in the El Rito Section. The inclusion of a copy of those bylaws as an Appendix to a Supplemental Order on Irrigation Water Requirements in Section 4 will moot *Defendant El Rito Community Ditch Association’s Motion for Declaration of Water Allocation Customs* filed April 23, 2007 (Doc. No. 8629). Therefore, the El Rito Ditch Association hereby withdraws the Motion filed April 23, 2007 in favor of this Joint Motion.

8. The proposed Supplemental Order on Irrigation Water Requirements in Section 4 shall include a statement that the bylaws of the El Rito Ditch Association may be revised at any time by the members of the Association; that the inclusion of the bylaws as an Appendix to the Supplemental Order shall not be interpreted as the adoption or approval of those bylaws in these proceedings; and any challenge to the validity of those bylaws, or action to enforce those bylaws, shall be the subject of a separate proceeding in a court having original jurisdiction over such a dispute.

WHEREFORE the State of New Mexico and the El Rito Ditch Association respectfully request the Court to grant this motion and to enter a Supplemental Order on Irrigation Water Requirements in the El Rito Section amending the Agreement on Water Rights and Consent Judgment for the El Rito Ditch Association and amending all individual subfile orders entered in the El Rito

Section to date with respect to the determination of irrigation water requirements in the El Rito Section as described above; further, the current bylaws of the El Rito Ditch Association should be attached as an Appendix to the Supplemental Order, and a copy of the Supplemental Order and Appendix should be mailed to all defendants in the El Rito Section.

Respectfully submitted,

/s/ Ed Newville
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of January, 2009 I filed the foregoing electronically through the CM/ECF system which caused the parties on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail.

/s/ Ed Newville
Edward G. Newville